

1. Is claimant entitled to TTD for the period from March 23, 2009, through June 4, 2009? The ALJ ruled that claimant had been returned to work with temporary restrictions and was able to perform those duties. Claimant had demonstrated the ability to work and earn wages and, therefore, was not temporarily totally disabled. Claimant argues that he was laid off from work on March 23, 2009, and not released to return to work by J. Mark Melhorn, M.D., until June 4, 2009. Respondent argues that claimant had displayed the ability to perform substantial

and gainful employment and was, therefore, not entitled to TTD. (The parties stipulated at oral argument to the Board that the March 29, 2009, date used by the ALJ in the Award was probably a typographical error and the appropriate date for claimant's layoff was March 23, 2009.)

2. What is the nature and extent of claimant's disability? Claimant was awarded a 5.25 percent impairment of function to the level of the right forearm for an injury suffered on March 6, 2009. The ALJ determined that claimant had failed to prove that he suffered from carpal tunnel syndrome as the result of the accident. Claimant alleges that he is entitled to an impairment of 14 percent to the forearm for the carpal tunnel syndrome and de Quervain's tenosynovitis, and for range of motion limitations in the right wrist. Respondent argues that the Award of the ALJ should be affirmed.

#### **FINDINGS OF FACT**

Claimant began working for respondent on or about February 13, 2009, as a laborer. On March 6, 2009, claimant was holding clamps for a pipe being laid for a natural gas line. Somehow, the 16-inch metal pipe smashed claimant's right wrist. Claimant was taken to the Hutchinson Clinic where he was seen by Christopher P. Rodgers, M.D. X-rays and an MRI were taken and later reported as normal. Claimant was released to return to work light duty with no lifting with the right hand. Claimant returned to work for respondent driving a truck with an air compressor. Claimant continued working this job until March 23, 2009, when he was laid off from the job, along with several other workers. The indication was that the job was coming to an end and the layoff was somewhat anticipated.

Claimant was examined on March 12, 2009, by Jeffrey L. Thode, M.D., of the Hutchinson Clinic Same Day Care Department. Claimant was restricted from lifting more than 10 pounds, and remained on light duty with respondent. Claimant was also seen at the Hutchinson Clinic by Dr. Rodgers and Verlin K. Janzen, M.D. Claimant was diagnosed with a contusion of the right wrist, and the 10-pound work restriction remained. Claimant was also being prescribed anti-inflammatory medication. However, at some point in his treatment, claimant refused the anti-inflammatory medication. It was explained that the reason claimant was examined by several physicians was due to the rotating system utilized by the Hutchinson Clinic with its physicians.

Because claimant continued to exhibit complaints, Dr. Thode offered to refer claimant to a specialist, but claimant declined at one point. However, at the May 1, 2009, examination, when Dr. Thode offered to refer claimant to an orthopedic specialist, claimant apparently agreed, as claimant was referred to board certified hand specialist J. Mark Melhorn, M.D., on June 4, 2009. Claimant was diagnosed by Dr. Melhorn with a painful right hand and wrist, a history of a blunt blow to the right hand and neurapraxia, which is a medical term for altered sensation or pain in the hand or wrist area. After the

examination and after reviewing x-rays and other reports, Dr. Melhorn determined that claimant could return to regular work. The doctor did offer wrist injections due to claimant's ongoing complaints of tenderness in the wrist. Claimant agreed to the injections and, at the July 6, 2009, examination, noted the wrist pain and lack of motion had improved after the injection. By August 13, 2009, claimant reported to Dr. Melhorn that he was asymptomatic while doing regular work activities, but he did fatigue easily during a full day of work. It is noted that claimant was not working at this time, according to this record. Claimant requested that he be released to regular work without restrictions. Dr. Melhorn concurred. Dr. Melhorn testified that claimant would continue to have some pain in the wrist on an intermittent basis. He rated claimant at 1.5 percent impairment to the right forearm due to the pain, discomfort and loss of sensation, with the impairment being provided pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup>

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Flutter, M.D., for an examination on September 1, 2009. The history provided to Dr. Flutter was consistent with claimant's accident. Dr. Flutter reviewed claimant's medical records, including those of the Hutchinson Clinic and Dr. Melhorn. Dr. Flutter acknowledged that both the x-ray and MRI done on claimant's right wrist had been read as normal. During the examination, claimant reported pain in the right wrist with numbness affecting the thumb and index finger of the right hand. The pain level was at a 6 on a scale from 1 to 10. Bending, twisting, exercise, cold and ice and heat all made the pain worse. Claimant described numbness in the tip of his right thumb and his entire right index finger, with some weakness in the right wrist when lifting. Claimant was diagnosed with a right hand and wrist crush injury and contusion. Dr. Flutter also diagnosed claimant with probable right carpal tunnel syndrome and probable right de Quervain's tenosynovitis. He acknowledged that no nerve conduction tests had been performed. While Dr. Flutter acknowledged that there are subjective elements to testing when one relies on the information provided by a patient, he thought that claimant's responses to the testing seemed appropriate. Dr. Flutter rated claimant at 7 percent impairment to the right wrist for deficits in wrist range of motion and 2 percent impairment for right wrist supination deficit. He further rated claimant at 5 percent impairment to the wrist for a mild degree of median nerve entrapment. All total, claimant had a 14 percent permanent partial functional impairment to the right upper extremity at the wrist, pursuant to the fourth edition of the *AMA Guides*.<sup>2</sup>

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> *AMA Guides* (4th ed.).

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>6</sup>

K.S.A. 510c(b)(2)(3) states:

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating

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<sup>3</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>6</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

(3) Where no award has been entered, a return by the employee to any type of substantial and gainful employment or, subject to the provisions of subsection (b)(2), a release by a treating health care provider or examining health care provider, who is not regularly employed or retained by the employer, to return to any type of substantial and gainful employment, shall suspend the employee's right to the payment of temporary total disability compensation, but shall not affect any right the employee may have to compensation for partial disability in accordance with K.S.A. 44-510d and 44-510e and amendments thereto.

Claimant had been released to work light duty, and respondent provided claimant with a job driving the air compressor truck. This was not a made-up job, but was, instead, a job which was both a regular job and one required for respondent's business. Claimant displayed the ability to perform this job and was, therefore, not "on account of the injury . . . completely and temporarily incapable of engaging in any type of substantial and gainful employment".<sup>7</sup> Claimant had displayed the ability to perform work which was both substantial and gainful employment. Accordingly, claimant has failed to prove that he was temporarily and totally disabled during the period from March 23, 2009, through June 4, 2009. As such, an award of TTD after his layoff was properly denied by the ALJ, and that denial is affirmed.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>8</sup>

Both Dr. Melhorn and Dr. Fluter provided functional impairment ratings pursuant to the fourth edition of the *AMA Guides*.<sup>9</sup> Their ratings vary widely, with Dr. Melhorn finding little wrong with claimant, as claimant was asymptomatic by the time of the August 13, 2009, examination. However, barely two weeks later, when being examined by Dr. Fluter, claimant had pain at the level of a 6 on a scale from 1 to 10. Claimant also displayed symptoms of carpal tunnel syndrome and de Quervain's tenosynovitis, neither of which was diagnosed by Dr. Melhorn. Additionally, the range of motion findings of Dr. Fluter differed from those found in the May 29, 2009, report of Dr. Rodgers. The ALJ determined that the truth lies somewhere in between Dr. Melhorn's 1.5 percent impairment and Dr. Fluter's 14 percent impairment to the upper extremity at the wrist level. The Board agrees and finds the award of a 5.25 percent impairment of function to the level of the

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<sup>7</sup> Award at 6.

<sup>8</sup> K.S.A. 44-510e(a).

<sup>9</sup> *AMA Guides* (4th ed.).

forearm on the right side is supported in this record and is proper. Therefore, the Award of the ALJ is affirmed.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that he was temporarily and totally disabled from March 23, 2009, through June 4, 2009. Additionally, claimant was properly awarded a 5.25 percent permanent partial functional disability to the right forearm for the injuries suffered on March 6, 2009.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated June 22, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge